No. 80-1040

Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1980

I. MEYER PINCUS,

Appellant,

vs.

ESTATE OF LEO GREENBERG, HON. PAUL M. MARKO, III and HON. LEROY H. MOE,

Appellees.

On Appeal from the Supreme Court of Florida

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Do Fla. Stat. §§733.302 and 733.304 (1977) violate U.S. Const. Art. IV, §2 and U.S. Const. Amend. XIV when, in accordance with such Florida statutes, appellant, a non-resident of Florida, was summarily denied appointment as a personal representative of the Estate of Leo Greenberg although such appointment was expressly directed in his Will; the Will was prepared and executed outside of Florida at a time when decedent was a resident of New Jersey (having moved to Florida shortly before his death); and the Will provided for the disposition of assets substantially all of which are located outside of Florida?

2. Was the summary denial by the Circuit Court of Broward County, Florida, of appellant's request for appointment as a personal representative, without a hearing or affording appellant an opportunity to demonstrate his qualifications, consistent with the due process requirements of U.S. Const. Amend. XIV?

3. Do Fla. Stat. §§733.302 and 733.304 (1977) violate U.S. Const. Art. I, §8 when they prohibit the appointment of a non-resident as a personal representative of an estate the substantial and significant assets of which are located outside of Florida?

4. Was the failure of the Supreme Court of Florida to give effect to the decision of *Fain v. Hall,* 463 F. Supp. 661 (M.D. Fla. 1969), which declared the same Florida statutes to be unconstitutional, in violation of U.S. Const. Art. IV, §1, when the State of Florida was a party to that action and no appeal was taken therefrom?

PARTIES

The caption contains the names of all interested parties to the knowledge of appellant.

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ESTATE OF LEO GREENBERG, HON. PAUL M. MARKO, III, and HON. LEROY H. MOE,

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On Appeal from the Supreme Court of Florida

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Supreme Court of Florida has not been reported as yet. It is printed in the Appendix, *infra*, p. 1a. The orders of the circuit court have not been reported as yet. They are printed in the Appendix, *infra*, pp. 27a-32a. The notice of appeal was filed on November 17, 1980. Judgment was entered on October 30, 1980.

JURISDICTION

The Will of decedent was offered for probate in the Circuit Court of Broward County, Florida. As part of these proceedings, appellant filed an application for appointment as a co-personal representative of the estate in accordance with the express terms of the Will. That application was summarily denied by the court (Hon. Leroy H. Moe) on December 4, 1978. Appeal therefrom was taken to the District Court of Appeal, Fourth District of Florida. That court thereafter remanded the case to the circuit court to reconsider its decision in light of *Fain v. Hall, supra.* The denial was adhered to and confirmed by an order dated July 13, 1979 (Hon. Paul M. Marko, III).

Appellant then appealed to the District Court of Appeal, Fourth District, for a review of the orders. That appeal was transferred to the Supreme Court of Florida because the questions presented were of a substantial constitutional nature. That court, in its order of October 30, 1980, by a vote of 4 to 3, affirmed the order of the circuit court.

Appellant bases his right to appeal on 28 U.S.C. §1257(2), in that the Supreme Court of Florida upheld Fla. Stat. §§733.302 and 733.304 (1977) against appellant's claim that the sections violated the United States Constitution.

THE STATUTES INVOLVED

The text of Fla. Stat. §§733.302 and 733.304 (1977) are set forth in full in the Appendix, pp. 38a-39a.

The provisions of the United States Constitution claimed to be applicable herein are reproduced in full in the Appendix, p. 38a.

STATEMENT OF THE CASE

Decedent was for many years a resident of the State of New Jersey. Appellant was his friend and tax adviser for 23 years, both in business and on a personal level. Decedent expressed and reposed great personal confidence in appellant.

In 1964, at a time when decedent was still a resident of New Jersey, he executed his Last Will and Testament. In the Will, the decedent nominated his son, David I. Greenberg, and his accountant, Milton Kornbluth — both residents of New Jersey — to serve as co-personal representatives of his estate; he also nominated appellant to act as co-personal representative with his son in the event Milton Kornbluth should fail or refuse to act. Mr. Kornbluth renounced his right to serve as co-personal representative by a written renunciation filed with the circuit court in this case, with the result that appellant became entitled to serve.

Shortly before his death on July 14, 1978, decedent moved to the State of Florida and died there.

The decedent's Will was offered for probate in the Circuit Court of the Seventeenth Judicial District (Broward County) Florida. It disposed of all of decedent's assets — substantially all of which were located outside the State of Florida. The only assets of decedent located in Florida were several bank accounts containing small amounts and the apartment in which decedent lived.

Appellant is an attorney admitted to practice in the State of New York and is a resident of New York. He was decedent's tax adviser and friend for approximately 23 years. He had planned decedent's estate and was most familiar with decedent's assets and his wishes with respect thereto.

Appellant petitioned the circuit court to appoint him as co-personal representative in accordance with and pursuant to decedent's Will. In connection therewith, the other co-personal representative, decedent's son (another non-resident of Florida) consented to appellant's appointment. The circuit court (Hon. Leroy H. Moe, a party to this appeal) denied the appointment by order, dated December 4, 1978, without a hearing, predicated on the sole ground that appellant was "not a resident of the State of Florida nor related to decedent as required by Florida Statutes 733.304." (Appendix, p. 27a).

On December 26, 1978, appellant filed a notice of appeal with the District Court of Appeals, Fourth District. Thereafter, on March 2, 1979, appellant filed a motion to remand the case to the circuit court in light of the decision of the federal district court in *Fain v. Hall, supra,* which, by opinion and order dated January 3, 1979, held Fla. Stat. §§733.302 and 733.304 to be in violation of the United States Constitution. The State of Florida did not appeal from that decision and order, although it was a party to the action, and it became final and binding.

Appellant's motion to remand was granted on March 16, 1979. Thereafter, appellant filed a notice of motion for reconsideration with the circuit court and, in support of that motion, decedent's widow, daughter and son, all of whom are non-residents of Florida, requested the circuit court to vacate its prior orders and to issue the appropriate appointment to appellant. That application was denied on July 13, 1979, summarily and without a hearing. The order of Hon. Paul M. Marko, III refused to reconsider the December 4, 1978 order of Judge Moe for the same reasons given therein (Appendix, p. 29a).

Appellant again filed an appeal to the district court, which transferred the appeal to the Supreme Court of Florida on the ground that the questions involved were of a substantial

constitutional nature. The Supreme Court, by a 4-3 vote, thereafter upheld the challenged Florida statutes as constitutional under the United States Constitution.

Appellant raised the constitutional questions at each appropriate stage of the proceedings in the state courts.

The Supreme Court of Florida found that the applicable test for constitutionality was whether the statutes have a rational basis or pass a minimum scrutiny test, and that to pass each of those tests the statute had to bear some "reasonable relationship to a legitimate state purpose . . ." and such purpose was present in the protection of the estate and the rights of interested parties. It further held that there was no fundamental right to serve as a personal representative of an estate, and that the statute was not irrational.

REASONS WHY THE CONSTITUTIONAL QUESTIONS ARE SUBSTANTIAL AND REQUIRE PLENARY CONSIDERATION WITH BRIEFS ON THE MERITS AND ORAL ARGUMENT FOR THEIR RESOLUTION

The questions relating to the discrimination by the Florida statutes against non-residents are substantial and compel review and disposition by this Court.

In the first place, the constitutional rights of decedent, of his heirs and of appellant have been violated. Secondly, a decision by this Court would have significant and far-reaching effects. Our research reveals that at least 29 states have statutes similar to that of Florida, prohibiting a non-resident from serving as an estate representative. These statutes are cited in the Appendix, p. 40a. Several other states have somewhat similar provisions under differing circumstances. Thus, the decision of this Court would have nationwide impact and bear upon the validity of these statutes.

I.

THE FLORIDA STATUTES VIOLATED ARTICLE IV, SECTION 2 AND THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

U.S. Const. Art. IV, §2 and U.S. Const. Amend. XIV ensure to the citizens of each state the right to venture into another state and there enjoy the same privileges enjoyed by the citizens of that state. *Austen v. New Hampshire*, 420 U.S. 656 (1975); *Toomer v. Witsell*, 334 U.S. 385 (1948). And by like token, the Constitution allows citizens of each state to travel to other states freely and there enjoy the rights of citizens of those states.

The residency classification established by Fla. Stat. §§733.302 and 733.304 (1977) must, therefore, be subject to the strict scrutiny test because they affect two sacred and fundamental rights: (a) the right to appoint a personal and trusted person to represent and administer one's estate; and (b) the right to travel.

Moreover, appellant has a fundamental right to pursue a livelihood in the area of his expertise, *viz.*, estate and tax practice. That fundamental right is similarly restricted by virtue of the residency requirement established under the Florida statutes.

This Court has repeatedly held that a state statute is subject to the strict scrutiny test if it "operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution. . . ." *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1 (1973). *See In re Griffiths*, 413 U.S. 717 (1973). Once it is determined that a fundamental right is involved, the state is required to provide a

compelling need or justification for the classification in order to prevail over the personal interests asserted. *See, e.g., NAACP v. Alabama,* 357 U.S. 449 (1958).

A. The Right to Appoint a Personal Representative

This Court has accorded great deference to an individual's family decisions regarding marriage, divorce, education and procreation. *See, e.g., Loving v. Virginia,* 388 U.S. 1 (1967); *Boddie v. Connecticut,* 401 U.S. 371 (1971); *Roe v. Wade,* 410 U.S. 113 (1973); *Meyer v. Nebraska,* 262 U.S. 390 (1923).

We submit that writing a Will in contemplation of death is a necessary adjunct of the foregoing activities, and that appointment of a personal representative is the only way a decedent has of assuring that his wishes with respect to his estate will be carried out. Such activity, and the appointment of a personal representative, is a fundamental right which must be subject to the strict scrutiny test.

In *Fain v. Hall, supra,* the district court considered the constitutionality of the very Florida statutes here in question. In holding that the statutes were unconstitutional and did not pass the strict scrutiny test, the court held, at page 664:

> Writing a will and contemplating a death, the testator is concerned with the continued support and well-being of his family and other objects of his bounty, and with the management and distribution of his assets. The only means the testator has of supervising these posthumous activities is the selection of one or more personal representatives in whose ability, judgment and integrity the testator has confidence. The testator

> will normally know more about his affairs and about how they should be wound up than any other person or entity.
>
> In considering the legality of state statutes restricting individual interests courts consider application of either the "reasonable relation" test or the "compelling state interest" test. Frequently the selection of the test to be applied decides the result, i.e. the constitutionality vel non.
>
> It is now clear that where the individual interest being restricted is a fundamental one that the appropriate test is the "compelling state interest" one. That is, is there a compelling need or justification for the state action, by statute or otherwise to override the personal interest asserted. See, e.g. *NAACP v. Alabama,* 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1957).
>
> For the reaons urged by plaintiffs, the testator's judgment in this matter should not be disturbed, absent substantial, compelling justification.

It must be noted that on March 5, 1979, in the case of *Estate of Henry Heyman,* not reported otherwise, the Circuit Court for the Eleventh Judicial Circuit, Dade County, Florida, Case No. 79-1203, Judge Francis Christie appointed a New York resident, unrelated to the deceased, as a personal representative. This decision, as well as *Fain v. Hall, supra,* reaffirms the long-standing policy of Florida courts to accord "great deference to the testator's selection of a personal representative." *See Fain v. Hall, supra* at n. 3. Therefore, since these rights are deemed fundamental, the statutes do not provide a compelling justification in order to override the personal interests involved.

B. The Right to Travel

In addition to the basic right to appoint a personal representative for the continued protection of an individual's family, Fla. Stat. §§733.302 and 733.304 (1977) are in derogation of decedent's fundamental right to travel.

In the seminal case of *Shapiro v. Thompson,* 394 U.S. 618 (1969), where it was held that a one-year durational residency requirement to be eligible for welfare was unconstitutional, the Court stated (at page 629):

> This Court long also recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.

Subsequently, this Court held a state statute unconstitutional in *Memorial Hospital v. Maricopa County,* 415 U.S. 250 (1974) because it infringed upon the "basic constitutional freedom" of interstate travel. Although the Court found that there was no "penalizing" of the right to interstate travel as in *Shapiro v. Thompson,* it said that the State has the burden of proving a compelling state interest to justify the infringement of this right. The state was unable to meet this criterion and the Court reversed the Arizona Supreme Court's decision upholding the statute. *See also, Dunn v. Blumstein,* 405 U.S. 330 (1972).

The Florida statutes similarly impinge upon the right to travel by blatantly discriminating againt the multitude of people who plan to relocate or have recently relocated to Florida. Since their attorneys, business associates and friends most probably

reside outside of Florida, it effectively denies these individuals the right to appoint such persons as their personal representatives. The statute is particularly onerous where the decedent is a retiree who has moved to Florida in his later life, as in the instant case. Most of a decedent's friends and a substantial portion of his estate may be located outside of Florida even though the decedent has become a Florida resident.

Thus, if a decedent wishes to retain control over his choice of the individual who will administer his estate, he must restrict his right to travel to Florida. In *In re Estate of Harrison,* 366 N.Y.S. 2d 755 (Sur. Ct. 1974), the court specifically noted that the Florida statutes questioned herein was "offensive to the spirit and letter of the U.S. Constitution," 366 N.Y.S. 2d at 756, in that it infringed upon interstate migration. *See also, Hall v. King,* 266 So. 2d 33 (Fla. 1972).

C. The Right to Pursue a Livelihood

This Court has recognized that the right to practice one's trade and the right to pursue a livelihood are fundamental and are protected by the Constitution. *Hicklin v. Orbeck,* 437 U.S. 518 (1978); *Baldwin v. Montana Fish & Game Comm'n,* 436 U.S. 371 (1978); *In re Griffiths, supra; Truax v. Raich,* 239 U.S. 33 (1915). In *Graham v. Richardson,* 403 U.S. 365 (1971), this Court held:

> [C]lassifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. . . .

Accordingly, a state may not establish classifications based on nationality or citizenship which infringe upon these rights. Recently, this Court, in *Baldwin v. Montana Fish & Game Comm's, supra,* elucidated some of the rights which are deemed fundamental (436 U.S. at 384, n. 20), and concluded that the

right to pursue a livelihood is one such fundamental right (436 U.S. at 387). *See also, Hicklin v. Orbeck, supra,* where the Court invalidated an Alaska statute which required residency as a prerequisite to obtaining employment.

In *Traux v. Raich, supra,* the Court struck down a statute which discriminated against aliens in employment. The Court, by Justice Hughes, noted that "the discrimination is against aliens as such in competition with citizens in the described range of enterprises, and in our opinion it clearly falls under the condemnation of the fundamental law." 239 U.S. at 43.

Similarly, in *In re Griffiths, supra,* the Court found a Connecticut statute unconstitutional which required an individual to be a citizen in order to be admitted to practice law in Connectiuct. The State of Connecticut was unable to justify its requirements that effectively denied resident aliens this employment opportunity. The Court stated:

> Resident aliens, like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in a myriad of other ways to our society. It is appropriate that a state bear a heavy burden when it deprives them of employment opportunities.

413 U.S. at 722.

This Court has also rejected citizenship requirements in positions of public office and employment. *See also, Lynden Transport, Inc. v. State,* 532 P. 2d 700 (Alaska 1975); *Taggat v. Mandel,* 391 F. Supp. 733 (D. Md. 1975) (citizenship requirement rejected as qualification as a notary public).

It is not unusual for a portion of an estate attorney's income to be derived from the commissions he receives as the duly

appointed executor of his clients' estates. Clearly, the services rendered by the personal representative and the remuneration he receives make the position a form of employment. But, more importantly, it is an employment desired by the decedent himself. Therefore, the employment is a fundamental right that is protected by the Constitution.[1]

It is clear from the above that the Florida statutes are violative of at least three recognizable fundamental rights. There has not been any showing of a compelling state interest in restricting the decedent's right to appoint a personal representative of his choosing and in prohibiting appellant from serving in such capacity solely because he was not related to decedent and was not a resident of Florida at the time of the decedent's death. Indeed, as the dissenting opinion in this case points out:

> The choice to expend funds amassed in one's lifetime to insure that a *close* friend will supervise distribution of one's estate surely must come within the ambit of the right to be free of governmental paternalism.

Estate of Leo Greenberg, Deceased. __So. 2d__ (1980).

The Florida Supreme Court found that the "strict scrutiny" test was not applicable because the "constitution commits to the states the power to control the administration of the estates of their citizens. . . ." But that view is inapplicable to the case at bar.

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1. Even if the estate were to be deemed to "pass from" the State of Florida, and the executors are deemed employed through the state, then imposing a residence requirement upon them is unconstitutional for the same reasons that direct state employment cannot be restricted to citizens.

First of all, that claim rests upon *Mager v. Grima*, 49 U.S. 491 (8 How.) 490 (1850), but *Mager* held, at p. 493:

> Now the law in question is nothing more than an exercise of the power which every state and sovereignty possesses, of regulating the manner and term upon which property real or personal *within its dominion* may be transmitted by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it. . . . (Emphasis supplied)

At bar, the bulk of decedent's estate is located outside of the State of Florida. Indeed, the only assets in Florida were the apartment in which decedent lived at the time of his death and several small bank accounts. Everything else is located outside that state. Thus, Florida proposes to exercise dominion over assets not situated within its boundaries. Secondly, even if it is conceded that every state possesses the power to regulate the matter of inheritance, it certainly may not do so by setting up unconstitutional classifications, *i.e.*, by discriminating between residents and non-residents.

Even if the standard for reviewing the constitutionality of the Florida statutes was "mere rationality," we submit that the standard was not met at bar. At the outset, it is pertinent to note that the legislative history of the Florida statutes discloses the absence of a rational purpose to the statutes. In 1906, the legislation, Fla. Stat. §2337, provided that:

> Non-residents, if residing in the United States, may be appointed administrator or have letters testamentary upon the same terms and conditions and subject to the same rules and restrictions as residents of this State.

That provision remained in effect for thirty years until 1939, at a time when travel to Florida was difficult and lengthy. In 1939, the legislation was amended to prohibit a non-resident from serving unless he was an heir, devisee, or legatee or a spouse, father, mother, child, brother or sister of the decedent. 1939 Fla. Laws ch. 19671 (Fla. Stat. 732.47). In 1945, the legislation was again amended to provide, in pertinent part:

> A person who is not an actual bona fide resident of the State of Florida cannot qualify as a personal representative of an estate in Florida, unless such person is related by blood to the decedent within the third degree or is a spouse of the decedent.

1945 Fla. Laws ch. 22847.

In 1947, the legislation was again changed to provide, in pertinent part:

> A person who is not an actual bona fide resident of the State of Florida cannot qualify as a personal representative of an estate in Florida, unless such person is a legally adopted child of the decedent and [*sic*] adoptive parent or is related by lineal consaguinity to the decedent or is a spouse or a brother, sister, uncle, aunt, nephew or niece of the decedent.

Fla. Stat. §732.47(1) (1947).

That provision was again changed in 1974 to the language now before this Court, 1974 Fla. Laws ch. 74-106, §1. (In 1975, the statute was again amended to change the residence requirement to a domicile requirement and to add to the list of

eligibles who might be non-residents the spouses of all persons exempt from the residency requirement.[2] 1975 Fla. Laws ch. 75-220, §63.)

Presumably, Florida will contend, as its Supreme Court asserted in the majority opinion herein, that the requirement barring non-residents is necessary since it insures that a personal representative will be in close proximity to the interests of the Florida estate to protect the rights of interested parties. However, the appointment of relatives of decedents who are not residents of Florida is permissible under the statutes even if they reside thousands of miles away from the Florida estate.

It should be noted that, with the exception of the State of Florida, all interested parties, creditors, heirs and others, are located outside of Florida, as are substantially all of the estate's assets. The heirs and the other co-representative, who has already been appointed, have all sought and supported the appointment of appellant.

Moreover, when the legislation was first enacted, Florida was not concerned about the residence of the personal representatives. As Florida changed its legislation, and sought to restrict non-residents from serving as representatives, the list of exceptions to that prohibition grew. Thus, heirs and distant relatives, adopted children and their spouses, though non-residents, are eligible to be the representatives of the estate. Indeed, a Florida estate can be administered by non-residents so long as those non-residents bear some remote relationship to the decedent. Clearly, then, residence is no factor in the question of protecting the interests of interested parties.

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2. After appellant filed his petition, the Florida legislature again amended the statute to permit eligible non-residents to include persons related by lineal consanguinity to spouses, brothers, sisters, uncles, aunts, nephews and nieces of the decedent. 1979 Fla. Laws ch. 79-343, §6.

What is equally clear is that the Florida statutes in question are a thinly disguised form of protectionism for the Florida Bar. As everyone knows, people frequently choose their lawyers to act as their executors because of the confidence which they feel in the professional attitude, knowledge and integrity of their attorneys, especially where, as here, there is a relationship of long standing. Often, as people grow older, they move to the warm climates of the south, notably Florida. What Florida has sought to do is to force these citizens to abandon trusted professional advisors in favor of practitioners resident in that state who may be totally unfamiliar with the wishes and the assets of the decedent. Such parochial interests cannot be permitted to form the basis for upholding the statutes in question.

Indeed, permitting the Florida statutes to stand would mean that the one person in whom a decedent reposes the greatest confidence, and who has perhaps the most familiarity with the complexity of his assets and his wishes, will not be appointed; instead, a stranger totally unfamiliar with his affairs may be placed in charge of administering his estate. As a result, the decedent's estate and his heirs will be burdened with unnecessary complications and expense.

Appointment of a non-resident could not conceivably cause any complications so far as administering the estate is concerned (certainly in view of the long list of non-residents who are permitted to qualify), and clearly, the rights of interested parties can be protected since the estate and the personal representative are always subject to the supervision and control of the Florida probate court.

The Florida Supreme Court has itself suggested that the only legitimate state concerns in the appointment of a personal representative are: (1) basic ability to perform; and (2) amenability to service. *See Estate of Fernandez*, 335 So. 2d 829

(Fla. 1976). No one has suggested or contended that appellant lacks the ability to perform. And, in Florida, the non-resident personal representative would be amenable to service of process if he were appointed. *See* Fla. Stat. chs. 48 and 49 (1975).

The optional bond provision of Florida law could also alleviate the fears of an estate's creditors and beneficiaries with regard to any possible negligence or intentional acts of the personal representative. *See* Fla. Stat. §733.401-405 (1977). Moreover, if the personal representative is not able to settle and distribute the estate efficiently and expeditiously, he would be precluded from serving as a personal representative in any event. *See* Fla. Stat. §733.602(1) (1977). And, if the non-resident were to become physically or mentally incapable of performing his duties, he would be subject to removal. *See* Fla. Stat. §733.303(1)(b) (1977).

Appointment of a non-resident does not cause any needless delay in administering the estate or any travel expense in these times. Appellant, who resides in Long Island, New York (20 minutes from La Guardia Airport), is probably nearer to the Broward County probate court in this day of modern travel than a Florida resident (qualified under the statutes) who resides, say, at Fort Walton Beach in the northwestern part of Florida. The Florida resident, though qualified under the statutes, would take longer to travel to the Broward County courthouse than would appellant flying directly from New York.

Furthermore, the cost of such travel today is totally insignificant, particularly where appellant's great familiarity with the estate will facilitate the estate's rapid administration as compared with the delays that could be caused by a Florida resident who does not know the details of decedent's assets and liabilities.

It may be suggested by those who support the constitutionality of the Florida statutes that decedent could have avoided any constitutional question by creating a revocable *inter vivos* trust and transferring to it all of his assets, naming appellant as trustee. The argument has three separate fallacies in it.

In the first place, it assumes that decedent could predict with certainty the moment of his death, so that he would be able sufficiently in advance to create such a trust.

Secondly, it assumes that the courts would permit the Florida statutes to be evaded by this indirect means, and that the constitutionality of the Florida statutes can be upheld provided a decedent is prepared to incur further legal expense and to create a trust which would evade the Florida statutes.

Lastly, if the justification for the Florida statutes in question is that it will protect local interests, creation of an *inter vivos* trust which places the situs of the trust outside of Florida, *e.g.*, in New Jersey or New York, would require these local interests to travel 3,000 miles to New York or New Jersey to present their claims. Clearly, then, the argument is specious.

D. The Procedure Followed Below Violated Due Process Under the Fourteenth Amendment of the United States Constitution.

The Florida statutes were held to create an irrebuttable and permanent presumption that an unrelated non-resident is not qualified to act in Florida as a personal representative. Such irrebuttable presumption denied appellant the opportunity to be heard and to adduce testimony and demonstrate that he was "qualified" and that a rational basis existed for permitting his appointment. The circuit court did not permit a hearing, and the statute as applied should not be construed constitutionally without permitting a hearing in order to demonstrate a rational basis for allowing the appointment of a non-resident.

II.

THE FLORIDA STATUTES VIOLATE ARTICLE I, SECTION 8 OF THE UNITED STATES CONSTITUTION.

This Court has repeatedly rejected attempts by states to interfere with or impose burdens upon interstate commerce. *See Boston Stock Exchange v. State Tax Comm'n,* 429 U.S. 318 (1977); *Hughes v. Oklahoma,* 441 U.S. 322 (1979); *H.P. Hood & Sons, Inc. v. Du Mond,* 336 U.S. 525 (1949); *Cooley v. Board of Wardens,* 53 U.S. (12 How.) 299 (1852). Most recently, this Court struck down a parochial attempt by Florida to prevent banks located outside the state from entering Florida in order to render investment advisory services. *See Lewis v. BT Investment Manager, Inc.*, not yet reported officially, ____ U.S. ____, 100 S. Ct. 2009 (1980). In that case, this Court held:

> We disagree, however, with the suggestion that Exxon should be treated as controlling precedent for this case. Section 659.141(1) engages in an additional form of discrimination that is highly significant for purposes of Commerce Clause analysis. Under the Florida statute, discrimination against affected business organizations is not evenhanded because only banks, bank holding companies, and trust companies with principal operations outside Florida are prohibited from operating investment subsidiaries or giving investment advice within the State. It follows that § 659.141(1) discriminates among affected business entities according to the extent of their contacts with the local economy. The absence of a similar discrimination between interstate and local producer-refiners was a most critical factor in Exxon. Both on its face and in actual effect, §

> 659.141(1) thus displays a local favoritism or protectionism that significantly alters its Commerce Clause status. See Philadelphia v. New Jersey, 437 U.S., at 626-627; Baldwin v. G.A.F. Seelig, Inc., 294 U.S., at 527.
>
> Discouraging economic concentration and protecting the citizenry against fraud are undoubtedly legitimate state interests. But we are not persuaded that these interests justify the heavily disproportionate burden this statute places on bank holding companies that operate principally outside the State.

The rationale of *Lewis* is applicable to the case at bar. If the banks of other states cannot be excluded from entering Florida to render investment services, why should lawyers from other states be prevented from performing the wishes of decedents—their former clients—on any theory that does not make a mockery of the Commerce Clause.

III.

THE FLORIDA SUPREME COURT VIOLATED ARTICLE IV, SECTION 1 OF THE UNITED STATES CONSTITUTION.

In *Fain v. Hall, supra,* the Federal District Court for the Middle District of Florida determined that the Florida statutes here in question were unconstitutional. It directed the appointment of a non-resident as a personal representative of the estate involved in that case. *Fain* was brought against the Florida Circuit Court for Palm Beach County, and defendant was represented, as here, by the Attorney General of Florida. In short, the interests of Florida were presented, asserted and argued at length. No appeal was taken from that adverse

decision. Under the principles of *res judicata,* it is submitted that the issue is foreclosed from re-litigation by the same defendant. *See Parklane Hosiery Co. v. Shore,* 439 U.S. 322 (1979).

The Florida Supreme Court, by refusing to obey the final and conclusive judgment of *Fain,* failed to accord to a final federal judgment the full faith and credit mandated by U.S. Const. Art. IV, §1. *Stoll v. Gottlieb,* 305 U.S. 165 (1938); *Supreme Lodge, etc. v. Meyer,* 265 U.S. 30 (1924). Our system of federalism does not permit a state court to ignore a final binding federal court decision, however, the state court might disagree with that decision.

CONCLUSION

Decedent, Leo Greenberg, lived in New Jersey for most of his life and died soon after retiring to Florida. His Will was prepared in New Jersey and disposed of his assets, the vast majority of which were located outside of Florida. He chose as one of his personal representatives his long-time friend and adviser, appellant, who was most suitable for that position by training and familiarity with decedent's assets, affairs and intentions. His appointment was also sought to be confirmed by the heirs and the co-personal representative of the estate. Appellant was denied the opportunity to qualify as a personal representative solely because he was not a resident of Florida, and decedent has thus been denied the right to select as a co-personal representative the individual whom he regarded as best qualified to serve with his son as the personal representatives under his will.

It is respectfully submitted that the appeal herein warrants plenary consideration with appropriate briefs on the merits and oral argument.

Respectfully submitted,

s/ Irving Bizar
Attorney for Appellant

APPENDIX

OPINION OF THE SUPREME COURT OF FLORIDA

SUPREME COURT OF FLORIDA

No. 58,794

IN RE: ESTATE OF LEO GREENBERG,

Deceased.

[October 30, 1980]

ALDERMAN, J.

Meyer Pincus appeals an order of the circuit court denying his petition for appointment as a co-personal representative of the estate of Leo Greenberg. Upholding the constitutionality of sections 733.302 and 733.304, Florida Statutes (1977), the trial court denied this petition on the basis that Pincus was not a resident of Florida and was not related to Greenberg. We have jurisdiction pursuant to article V, section 3(b)(1), Florida Constitution (1972). Against challenges that they violate the equal protection and due process clauses of the fourteenth amendment and the privileges and immunities clause of article IV, section 2 of the Constitution of the United States, we uphold the constitutionality of sections 733.302[1] and 733.304[2] and affirm.

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1. Section 733.302 provides:

> Subject to the limitations in this part, any person sui juris who is a citizen of the United States and a resident of Florida at the time of the death of the person whose estate he seeks to administer is qualified to act as personal

(Cont'd)

Under these statutory provisions, a nonresident of Florida who is not related to decedent as specified in section 733.304 may not qualify as a personal representative. Pincus claims that

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(Cont'd)

> representative in Florida. A person who has been convicted of a felony or who, from sickness, intemperance, or want of understanding, is incompetent to discharge the duties of a personal representative is not qualified.

In In re the Estate of Fernandez, 335 So.2d 829 (Fla. 1976), we held that the United States citizenship requirement contained in section 733.302, Florida Statutes (1975), was invalid because such requirement violated the equal protection clauses of the fourteenth amendment to the United States Constitution and article I, section 2 of the Florida Constitution. Therein, we recognized that the statutory requirement that a person appointed as an administrator be a resident of Florida guaranteed the basic ability of one to perform the duties of a personal representative, but we held that the additional requirement of United States citizenship had no bearing on ability. In 1979, the legislature amended section 733.302 to eliminate the requirement of United States citizenship. Chapter 79-343, Laws of Florida (1979). The amendment deleted only the language, "is a citizen of the United States and," but left the remainder of the statute unchanged.

2. Section 733.304 provides:

> A person who is not domiciled in the state cannot qualify as personal representative unless the person is:
>
> (1) A legally adopted child or adoptive parent of the decedent;
>
> (2) Related by lineal consanguinity to the decedent;
>
> (3) A spouse or a brother, sister, uncle, aunt, nephew, or niece of the decedent; or
>
> (4) The spouse of a person otherwise qualified under this section.

the residency classification established by these statutes violates the equal protection clause of the fourteenth amendment and maintains that in evaluating his equal protection challenge, we should not apply the rational basis test normally applied in evaluating such challenges, but instead we should utilize the strict scrutiny test because the act impinges on the testator's "fundamental" right to appoint his personal representative and fundamental right to travel and abridges Pincus's right to pursue a livelihood.

The rational basis or minimum scrutiny test generally employed in equal protection analysis requires only that a statute bear some reasonable relationship to a legitimate state purpose. That the statute may result incidentally in some inequality or that it is not drawn with mathematical precision will not result in its invalidity. Rather, the statutory classification to be held unconstitutionally violative of the equal protection clause under this test must cause different treatments so disparate as relates to the difference in classification so as to be wholly arbitrary. *Dandridge v. Williams,* 397 U.S. 471 (1970); *Walters v. City of St. Louis,* 347 U.S. 231 (1954).

The strict scrutiny analysis requires careful examination of the governmental interest claimed to justify the classification in order to determine whether that interest is substantial and compelling and requires inquiry as to whether the means adopted to achieve the legislative goal are necessarily and precisely drawn. *Examining Board v. Flores De Otero,* 426 U.S. 572 (1976). This test, which is almost always fatal in its application, imposes a heavy burden of justification upon the state and applies only when the statute operates to the disadvantage of some suspect class such as race, nationality, or alienage or impinges upon a fundamental right explicitly or implicitly protected by the constitution. Those fundamental

rights to which this test applies have been carefully and narrowly defined by the Supreme Court of the United States and have included rights of a uniquely private nature such as abortions, *Roe v. Wade*, 410 U.S. 113 (1973); the right to vote, *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Bullock v. Carter*, 405 U.S. 134 (1972); the right of interstate travel, *Shapiro v. Thompson*, 394 U.S. 618 (1969); first amendment rights, *Williams v. Rhodes*, 393 U.S. 23 (1968); and procreation, *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

The Supreme Court of the United States has refused to expand fundamental rights beyond those explicitly or implicitly guaranteed by the constitution. Addressing the constitutionality of the Texas statutory system for public education against an equal protection challenge, the Supreme Court, in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), held that the financing system did not impinge on any fundamental right so as to call for application of the strict scrutiny test since education was not a right afforded explicit or implicit protection under the constitution. The Supreme Court carefully delineated the limits of the fundamental right rationale in its equal protection decisions; explained that the Court does not pick out particular human activities, characterize them as fundamental, and then give them added protection; and emphasized that it was not within the Court's province to create substantive rights in the name of guaranteeing equal protection. It declared that just because state legislation affects a matter gravely important to society, this is not a sufficient basis to characterize it as fundamental. *See also Lindsey v. Normet*, 405 U.S. 56 (1972). Rather, the Court stated that it merely recognizes an established constitutional right and gives to that right no less protection than the constitution itself demands.

Pincus characterizes as fundamental the testator's right to appoint a personal representative, thus impelling application of the strict scrutiny test. We cannot agree since this right is not one explicitly or implicitly guaranteed by the constitution. In fact, the right to make a will and other matters relating thereto such as designation of a personal representative are rights created by statute. The constitution commits to the states the power to control the administration of the estates of their citizens. *Labine v. Vincent,* 401 U.S. 532 (1971); *Demorest v. City Bank Farmers Trust Co.,* 321 U.S. 36 (1944). There is nothing in the federal constitution which would forbid the state legislature to limit, condition, or even abolish the power of testamentary disposition of property within its jurisdiction. We have ofttimes reiterated that the power to alienate property by last will and testament is not an inherent right of a citizen but rather is one derived from legislation. *Efstathion v. Saucer,* 158 Fla. 422, 29 So. 2d 304 (1947); *Taylor v. Payne,* 154 Fla. 359, 17 So. 2d 615 (1944), *appeal dismissed,* 323 U.S. 666 (1944); *In re Sharp's Estate,* 133 Fla. 802, 183 So. 470 (1938). *See also* Simon, *Redfearn Wills and Administration in Florida,* 5th edition (1977), section 2.03. Notwithstanding the decision of the federal district court in *Fain v. Hall,* 463 F. Supp. 661 (M.D. Fla. 1979), which we find to be wholly unpersuasive, we hold that the right to appoint a personal representative is not one of the fundamental rights implicating utilization of the strict scrutiny test.

Relying on *Shapiro v. Thompson; Dunn v. Blumstein;* and *Memorial Hospital v. Maricopa County,* 415 U.S. 250 (1974), Pincus argues that sections 733.302 and 733.304 infringe upon the testator's fundamental right to travel and, therefore, the strict scrutiny test must be applied. The right to travel throughout the states has been recognized by the Supreme Court of the United States as a constitutionally protected right

implicating application of the strict scrutiny test whenever this right is penalized or somehow impinged upon by a legislative classification.

In *Shapiro v. Thompson,* the Supreme Court, employing the strict scrutiny test, struck a one-year durational residency requirement because it imposed a classification on welfare applicants which impinged on their right to travel freely from state to state. The Court held that the waiting period denied welfare benefits to otherwise eligible applicants solely because they recently moved into the jurisdiction. Then, in *Dunn v. Blumstein,* although holding a Tennessee durational residency requirement unconstitutionally violative of the equal protection clause, the Supreme Court emphasized that its decision was not intended to cast doubt on the validity of appropriately defined and uniformly applied bona fide residency requirements.

Later in *Memorial Hospital v. Maricopa County,* the Supreme Court held unconstitutionally violative of the equal protection clause an Arizona statute governing medical care for indigents requiring an indigent to be a resident of the county for the preceding twelve months in order to be eligible for free, nonemergency medical care because it impinged on the right of interstate travel by denying newcomers the basic necessities of life. The Court, however, narrowly confining its earlier decisions in *Dunn* and *Shapiro,* explained that the right to travel entails more than merely movement and that although a durational residency requirement impinges on the right to travel to some extent, the Court, in *Shapiro,* did not declare this requirement to be per se unconstitutional because it in some manner affected the right to travel. The Court emphasized that its earlier holding in *Shapiro* was conditioned on the caveat that some residency requirements would not be penalties upon the exercise of the constitutional right of interstate travel and that *Shapiro* did not

make clear the amount of impact required to give rise to the compelling state interest test. The Court held that the compelling state interest test is triggered by any classification which serves to penalize the exercise of the right to travel but further stated that the right of interstate travel must be seen as ensuring new residents the same right to vital governmental benefits in the state to which they migrate as are enjoyed by other residents of this state.

The Supreme Court, in *McCarthy v. Philadelphia Civil Service Commission*, 424 U.S. 645 (1976), upheld the validity of a municipal regulation requiring employees of the city to be residents of the city as a bona fide continuing residency requirement and held that this residency requirement did not infringe upon McCarthy's right to travel interstate. The Court once again differentiated between a requirement of continuing residency and a requirement of prior residency of a given duration and explained that *Shapiro* and *Dunn* did not question the validity of an appropriately defined and uniformly applied residency requirement. The Court found no support for McCarthy's claim that he had a constitutional right to be employed by the City of Philadelphia while he was living elsewhere.

In the recent decision of *Califano v. Torres*, 435 U.S. 1 (1978), the Supreme Court, after briefly summarizing the principles espoused in *Shapiro*, *Dunn*, and *Memorial Hospital*, held that the right to interstate travel does *not* require that a person who travels from one state to another be given benefits superior to those enjoyed by residents of other states to which he travels merely because he enjoyed those rights in the state from which he came.

Pincus transposes the proposition emanating from the fundamental right to travel in suggesting that a testator traveling to Florida must be given superior benefits to those enjoyed by Florida residents since the testator enjoyed those benefits in the state from which he came. The Supreme Court, in *Califano,* renounced this suggestion and announced that the broader implications of this transposition in other areas of substantive law would destroy the independent power of each state under the constitution to enact laws uniformly applicable to all of its residents. We find that sections 733.302 and 733.304 do not penalize the exercise of the testator's right to travel in the sense contemplated by the Supreme Court in those decisions where it has applied the strict scrutiny test.

Pincus's contention that these statutes impinge on his fundamental right to pursue a livelihood, thereby requiring application of the strict scrutiny test, is also without merit. He characterizes the privilege of serving as a personal representative as the pursuit of a livelihood because, he asserts, it is not unusual for a portion of an estate attorney's income to be derived from the commissions he receives as administrator of his clients' estates. We do not find the incidental aspect of an estate attorney serving as a personal representative equivalent to what has been defined as the fundamental right to pursue a livelihood. There is no fundamental right to serve as a personal representative of an estate just as there is no fundamental right explicitly or implicitly guaranteed by the constitution to designate a personal representative. *Cf. McCarthy v. Philadelphia Civil Service Commission; Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307 (1976).

Pincus's asserted infringement of his right to pursue a livelihood bears no resemblance to the infringement of this fundamental right found to exist in *Hicklin v. Orbeck,* 437 U.S.

518 (1978), wherein the Supreme Court struck an Alaska hire law requiring that all Alaska oil and gas leases, easements, or right-of-way permits for oil and gas pipelines purposes, unitization agreements, or any renegotiation of any of these to which the state is a party contain a provision requiring the employment of qualified Alaska residents in preference to nonresidents and imposing a one-year durational residence requirement.

Concluding that a Montana elk hunting statute did not deprive anyone of a means of livelihood, the Supreme Court, in *Baldwin v. Montana Fish and Game Commission,* 436 U.S. 371 (1978), reiterated that some distinctions between residents and non-residents merely reflect the fact that this is a nation composed of individual states and are permitted. Only those distinctions which hinder the formation, purpose, or development of a single union are prohibited.

The incidental commissions of a personal representative are not "sufficiently basic to the livelihood of the Nation that the States may not interfere with a nonresident's participation therein without similarly interfering with a resident's participation." *Baldwin v. Montana Fish and Game Commission,* 436 U.S. at 388. Indisputably, Pincus has no absolute right to pursue his chosen livelihood as an estate attorney in Florida. *See Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975); *In re Griffiths,* 413 U.S. 717 (1973); *Silverman v. Browning,* 414 F. Supp. 80 (D.C. Conn. 1976), *aff'd,* 429 U.S. 876 (1976). *See also Leis v. Flynt,* 439 U.S. 438 (1979).

Since neither a suspect class nor a fundamental right is affected by the legislation in question, the rational basis or minimum scrutiny test applies in evaluating the equal protection challenge. Utilizing this test, we hold that the distinctions drawn

by sections 733.302 and 733.304 bear a reasonable relationship to a legitimate state objective and therefore do not violate the equal protection clause. The state, in enacting these provisions, recognized that the administration of a decedent's estate is an intensely localized matter requiring the personal representative to be thoroughly informed on local matters and to be available to the court, beneficiaries, and creditors of the estate. The state declares that these statutes serve the valid function of ensuring that the personal representative, if not a relative of the testator, is close enough in proximity to the Florida estate to protect the rights of the creditors, ensure that the estate will be probated without needless delays caused by travel, and reduce the cost of representation to the estate by reducing travel costs or preventing the need to associate an in-state representative. In *In re the Estate of Fernandez,* 335 So.2d 829 (Fla. 1976), we expressly recognized that the residency requirement, along with the statutory provision that a person incompetent to discharge the duties of a personal representative is not qualified to serve, guarantees the basic ability to perform the duties of a personal representative.

Pincus further maintains that the exemption in section 733.304 for nonresident relatives of a decedent demonstrates that the statute is irrational. We disagree. Where utilizing the rationality test, the equal protection clause is not violated merely because a classification made by the laws is not perfect. Equal protection does not require a state to choose between attacking every aspect of the problem or not attacking it at all, and a statutory discrimination will not be set aside if any statement of facts reasonably may be conceived to justify it. *Dandridge v. Williams.* To be constitutional, a statutory classification need not be all-inclusive. *Newman v. Carson,* 280 So.2d 426 (Fla. 1973). Furthermore, we find that it is not unreasonable for an

exception to be created for nonresident relatives because, more than likely, the nonresident relative will also be a beneficiary of the decedent's estate.

Finding no violation of the equal protection clause, we proceed to Pincus's contention that sections 733.302 and 733.304 violate the due process clause of the fourteenth amendment because they create an irrebuttable presumption that otherwise competent persons are not qualified to serve as personal representatives because of their nonresidency. Relying upon *Stanley v. Illinois,* 405 U.S. 645 (1972); *Vlandis v. Kline,* 412 U.S. 441 (1973); and *Cleveland Board of Education v. LaFleur,* 414 U.S. 632 (1974), he argues that his presumed inability to serve is predicated on his status as a nonresident and that the irrebuttable presumption arises when he is not permitted to rebut the assumed conclusion.

Stanley v. Illinois dealt with a due process challenge to an Illinois law under which children of unwed fathers become wards of the state upon the death of the mother. This law created a presumption that a father was unfit because he was not married to his child's mother. Upon the death of the mother of Stanley's children with whom he had lived intermittently for eighteen years, the children were declared wards of the state without a hearing having been held to determine Stanley's fitness as a father. The Supreme Court addressed the issue of whether a presumption that distinguishes and burdens all unwed fathers is constitutionally repugnant and held that, as a matter of due process, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him. The Court made it clear that in considering whether a due process violation existed, the court must begin with a determination of the precise nature of the governmental function involved as well as the private interest affected by the legislation since due process of

law does not require a hearing in every conceivable case of governmental impairment of a private interest. Alluding to its previous decisions of *Griswold v. Connecticut,* 381 U.S. 479 (1965); *Skinner v. Oklahoma;* and *Meyer v. Nebraska,* 262 U.S. 390 (1923), which have emphasized the importance of the family and what has been characterized as the essential rights to conceive and to raise one's children, the Court found that Stanley's interest in retaining custody of his children was substantial and warranted great deference.

Although acknowledging the state's right to classify students as residents and nonresidents, the Supreme Court, in *Vlandis v. Kline,* struck as violative of the due process clause a Connecticut statute which permanently and irrebuttably classified as nonresidents for purposes of determining tuition and fees those married students whose legal address was outside the state at the time of their applications for admission and those unmarried students whose legal address was outside of Connecticut for any part of the one-year period preceding admission application. This statutory presumption effectually allowed the state to classify as "out-of-state students" those who were actually bona fide residents of the state. The Supreme Court held the statutory presumption invalid on the basis that the presumption of nonresidence is "not necessarily or universally true in fact" and because the state had "reasonable alternative means of making the crucial determination" of residence and held that due process required that the state allow an individual an opportunity to present evidence demonstrating that he is a bona fide resident entitled to in-state rates.

A mandatory maternity leave rule for schoolteachers was stricken by the Supreme Court in *Cleveland Board of Education v. LaFleur* as violative of the due process clause because it established a conclusive presumption of the physical incapacity

of the teacher after the fourth or fifth month of pregnancy, which presumption was neither necessarily nor universally true. The Supreme Court, in applying this strict test and in finding the presumption unconstitutional, placed much emphasis on the fact that the maternity leave regulation affected one of the basic civil rights of man and penalized the recognized fundamental constitutional freedom of personal choice in matters of marriage and family life.

The irrebuttable presumption rationale employed by the Supreme Court in *Stanley, Vlandis,* and *Cleveland Board of Education,* which has been characterized by several of the justices as the equal protection clause masquerading as the due process clause,[3] has been considerably narrowed by the Supreme Court in subsequent decisions.

In *Sosna v. Iowa,* 419 U.S. 393 (1975), an Iowa statutory requirement that a petitioner in a divorce action be a resident of the state for one year preceding the filing of the petition was asserted to violate the due process clause on the alleged ground that it denied the litigant the opportunity to make an individualized showing of bona fide residence. Mr. Justice Rehnquist, who had dissented in *Vlandis v. Kline,* authored the majority opinion holding that the residency requirement did not violate the due process clause and reasoned:

> An individualized determination of physical presence plus the intent to remain, which appellant apparently seeks, would not entitle her to a divorce even if she could have made such a

3. Cleveland Board of Education v. LaFleur, 414 U.S. at 651 (Mr. Justice Powell, concurring in result), 414 U.S. at 657 (Mr. Justice Rehnquist, dissenting); Vlandis v. Kline, 412 U.S. at 459 (Mr. Chief Justice Burger, dissenting).

> showing. For Iowa requires not merely "domicile" in that sense, but residence in the State for a year in order for its courts to exercise their divorce jurisdiction.

419 U.S. at 409-10. The Court noted that the states have virtually an exclusive province over the regulation of domestic relations.

Then, in *Weinberger v. Salfi*, 422 U.S. 749 (1975), in evaluating a due process violation claim addressed to a federal statute which precluded widows and their children from receiving social security survivors' benefits unless the claimant's relationship to the wage earner existed for at least nine months before his death, the Supreme Court again substantially restricted the application of the stricter irrebuttable presumption rationale earlier announced. The Court distinguished *Stanley v. Illinois*, *Vlandis v. Kline*, and *Cleveland Board of Education v. LaFleur*, and, applying a rational relationship test to determine the validity of this conclusive legislative presumption, the Court upheld its validity and explained:

> [T]he question raised is not whether a statutory provision precisely filters out those, and only those, who are in the factual position which generated the congressional concern reflected in the statute. Such a rule would ban all prophylactic provisions, and would be directly contrary to our holding in *Mourning, supra* [*Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1973)]. Nor is the question whether the provision filters out a substantial part of the class which caused congressional concern, or whether it filters out more members of the class

> than nonmembers. The question is *whether Congress, its concern having been reasonably aroused by the possibility of an abuse which it legitimately desired to avoid, could rationally have concluded both that a particular limitation or qualification would protect against its occurrence, and that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule. We conclude that the duration-of-relationship test meets this constitutional standard.*

422 U.S. at 777 (emphasis added).

Subsequently, in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), the Supreme Court clarified its holding in *Weinberger* insofar as concerned the limitations it imposed on the irrebuttable presumption doctrine, applied the rational relationship test, and upheld against a due process challenge the constitutionality of a federal law employing two irrebuttable presumptions: (1) a coal miner afflicted with complicated pneumoconiosis is conclusively presumed to be totally disabled due to pneumoconiosis and (2) if the miner has died, it is irrebuttably presumed that he was totally disabled by pneumoconiosis at the time of his death and that his death was caused by pneumoconiosis. The Court explained:

> But in a statute such as this, regulating purely economic matters, we do not think that Congress' choice of statutory language can invalidate the enactment when its operation and effect are clearly permissible. *Cf. Weinberger v. Salfi*, 422 U.S. 749, 767-785 (1975); *McDonald v. Board of*

Election, 394 U.S. 802, 809 (1969); *United States v. Carolene Products Co.,* 304 U.S. 144, 154 (1938).

. . . .

We have consistently tested presumptions arising in civil statutes such as this, involving matters of economic regulation, against the standard articulated in *Mobile, J. & K.C.R. Co. v. Turnipseed,* 219 U.S. 35, 43 (1910):

"That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate." [Cases omitted.]

Moreover, as we have recognized:

"The process of making the determination of rationality is, by its nature, highly empirical, and in matters not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it." *United States v. Gainey,* 380 U.S. 63, 67 (1965).

428 U.S. at 23-24, 28.

The stricter test enunciated in *Stanley v. Illinois* and its progeny has been effectively restricted to cases involving fundamental constitutional rights much the same as the compelling interest test in the analysis of equal protection claims. Here, no fundamental rights are impinged, and therefore measured against the reasonableness test enunciated in *Weinberger v. Salfi,* we conclude that sections 733.302 and 733.304 are constitutional. As we have previously explained, these statutes represent a rational means of accomplishing a legitimate state goal.

Furthermore, we hold that sections 733.302 and 733.304 do not violate article IV, section 2, Constitution of the United States, which provides: "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." Pincus misapprehends the distinctions between the treatment of residents and nonresidents against which the privileges and immunities clause protects. The Supreme Court, in *Baldwin v. Montana Fish and Game Commission,* defining the limits of the privileges and immunities protection, explained that some distinctions between residents and nonresidents are permitted and that only those distinctions which hinder the formation, purpose, or development of a single union of the states is prohibited. Performing the task of a personal representative does not rise to the level of a privilege or immunity bearing upon the vitality of the nation as a single entity. As has already been noted, the Supreme Court of the United States has acknowledged the state's province in regulating the manner of testamentary dispositions. Pincus has no fundamental right to serve as a personal representative in Florida.

Accordingly, having concluded that sections 733.302 and 733.304 are constitutional, we affirm the trial court's order

denying Pincus's petition for appointment as a co-personal representative of the estate of Leo Greenberg.

It is so ordered.

BOYD, OVERTON and McDONALD, JJ., Concur
ENGLAND, J., Dissents with an opinion, with which SUNDBERG, C.J. and ADKINS, J., Concur

ENGLAND, J., dissenting.

By enacting sections 733.302 and 733.304, Florida Statutes (1977), the Florida Legislature has chosen to forbid certain nonresidents from acting as personal representatives for Florida estates. Leo Greenberg died a resident of Florida leaving a will in which he first named his son and his accountant as co-personal representatives, and then named Meyer Pincus as successor personal representative to his accountant. Pincus was not related to Greenberg by blood or marriage, but he had been Greenberg's attorney and tax advisor before Greenberg moved to Florida. When Greenberg's accountant renounced his right to serve as co-personal representative, Meyer indicated his willingness to serve. He was refused permission, however, by reason of the statutory residency requirements of Florida probate law.

The crucial inquiry in determining whether Pincus may serve as Greenberg's personal representative is not whether he is a resident of Florida, for the statute does not require residency for everyone. Rather, the key question is whether the state can justify on any rational basis denying letters testamentary to Pincus because he happens not to be one of those excepted from the residency requirement; that is, Greenberg's spouse, brothers, sisters, uncles, aunts, nieces, nephews, adopted children, adoptive parents, any relative by lineal consanguinity, or a spouse of any of these persons.

I agree with the majority that the "mere rationality" standard of review is appropriate here, but I firmly believe that the state's classification for qualified nonresident personal representatives is arbitrary and irrational to the point of denying equal protection of the laws.

The state essentially asserts three interests which might justify the statute. Two are so unpersuasive as to require little discussion.

First, the state asserts that the statute eliminates the needless delay in the administration of estates which may be caused by travel. This concern, however, is hardly sound, as it applies no less or more forcefully to the multiplicity of other nonresidents authorized by the statute to serve as personal representatives.[1]

Second, the state contends that the cost of administering an estate is reduced by eliminating expenses of travel and the association of an in-state representative. The state's interest in reducing the cost of estate representation is commendable, but not defendable. A person who wishes to spend money for the travel of a close personal advisor cannot, in my view, be forbidden to do so without offending basic notions of where government's role begins and ends. The choice to expend the funds amassed in one's lifetime to insure that a close friend will supervise distribution of one's estate surely must come within the ambit of the right to be free from governmental paternalism. The state has no more legitimate interest in preventing a testator's election to spend administrative costs for his estate than it has in selecting his beneficiaries.

The state's third contention in support of these statutes is presumptively plausible. The state suggests that residency insures that a personal representative will be in close proximity to the interests of the Florida estate to protect interested parties' rights, and I believe that goal is a possible justification for the disparate treatment of nonresidents. In fact, however, the statute as drawn is not rationally related to achieving that interest. A review of this statute's history makes this evident.

In 1906 the legislature provided that:

> Non-residents, if residing in the United States, may be appointed administrator or have letters testamentary upon the same terms and conditions and subject to the same rules and restrictions as residents of this State.[2]

For over thirty years that provision remained substantially unchanged until it was amended in 1939 to forbid nonresidents from serving unless they were an heir, devisee, or legatee as specified therein, a spouse, father, mother, child, brother or sister of the decedent, or a personal representative appointed prior to the effective date of that amendment.[3]

In 1945 the legislature again amended that statute (codified as section 732.47(1), Florida Statutes (1945 Supp.)),[4] to read:

> A person who is not an actual bona fide resident of the State of Florida cannot qualify as a personal representative of an estate in Florida, unless such person is related by blood to the decedent within the third degree or is a spouse of the decedent. However, any person who has qualified in Florida as a personal representative prior to the effective date of this law may continue to serve in such capacity.

In 1947 the legislature first enacted a provision similar to the one challenged here,[5] which provided:

> A person who is not an actual bona fide resident of the State of Florida cannot qualify as a personal representative of an estate in Florida,

> unless such person is a legally adopted child of the decedent and [*sic*] adoptive parent or is related by lineal consanguinity to the decedent or is a spouse or a brother, sister, uncle, aunt, nephew or niece of the decedent.[6]

That provision was changed as to form in 1974 to what is now section 733.304.[7] One year later the legislature amended the statute to change the residence requirement to a domicile requirement, and to add to the list of eligible nonresidents the spouses of all persons exempt from the residency requirement.[8] Finally, although it occurred after this case was filed below, the legislature continued its amendatory ways by revising the statute to expand the list of eligible nonresidents again, this time to include persons related by lineal consanguinity to spouses, brothers, sisters, uncles, aunts, nephews, and nieces of the decedent.[9]

This historical treatment of nonresident eligibility is revealing. It can be seen that the legislature first imposed no restrictions on a nonresident's service. In 1939 the first restrictions were added, aimed at preventing the service of virtually all nonresidents except certain heirs, devisees, legatees and close relatives of the decedent. In 1945 that provision was amended to exclude heirs from eligibility, expressing the legislature's desire to limit nonresidents' service only to those related by blood to the decedent within the third degree, or to spouses. This, presumably, fostered a proximity interest such as is now asserted by the state to support the statute.

Were the 1945 statute before us, I would find no fault with it. A statute such as that would treat all similarly situated persons alike, and a valid state interest in proximity would thereby be vindicated. I agree with my colleagues that the

fourteenth amendment "permits the states a wide scope of discretion in enacting laws which affect some group of citizens differently than others,"[10] and I agree with them that a statutory classification need not be all-inclusive to be constitutional.[11]

Bt the state's proximity interest has long since ceased to be protected. Successive amendments to the statute since 1945 have taken all rationality out of the law and evinced a protectionist philosophy which does not, in my view, comport with the fourteenth amendment to the United States Constitution. Each amendment since 1945 has made a slightly larger, and thereby less rational, exception to the proximity goal. The 1947 amendment allowed a limited number of less proximate nonresident relatives to serve. The 1974 amendment permitted adoptive parents and children to serve. The "clincher" came in 1975 when the legislature added to the list of eligible nonresidents the spouses of *any* of the enumerated relatives. (The 1979 amendment, though not technically relevant here, had continued this blunderbuss trend by allowing nonresident lineal blood relatives of any of the enumerated nondomiciled relatives to serve as personal representatives.)

Clearly, as the statute stood when Pincus applied for letters testamentary, its original purpose of limiting service to residents and close relatives—presumably to vindicate the state's proximity interest—has long since disappeared. In fact, it is fair to say that the "exception" for some nonresidents has swallowed the rule forbidding nonresidents to serve The kinship tie has become so attenuated that there no longer exists a protectable proximity interest. A close personal advisor, such as Pincus was to Greenberg, is a far more rational choice by the decedent than the choice of remote strangers which the statute would allow.[12]

I would hold the statutory classification now before us to bear no rational relation to any legitimate state interest. The Florida legislature must make up its collective mind either to exclude nonresidents or to permit them to serve; it cannot have matters both ways. I would strike the residency statute and allow Meyer Pincus to serve as co-personal representative for his former client.

SUNDBERG, C.J. and ADKINS, J., Concur

1. This concern is essentially an argument for administrative convenience which, as indicated by the United States Supreme Court, under certain circumstances, may not be a legitimate basis for discrimination. *See* Shapiro v. Thompson, 394 U.S. 618, 638 (1969) (Justice Brennan stating in dicta that "even under traditional equal protection tests," the asserted state interest of administrative convenience "would seem irrational and unconstitutional").

2. § 2337, Gen. Stat. of Fla. (1906).

3. Ch. 19671, Laws of Fla. (1939), *unofficially codified as* § 5541(26), Comp. Gen. Laws of Fla. (1940).

4. Ch. 22847, Laws of Fla. (1945).

5. Ch. 22819, Laws of Fla. (1947).

6. § 732.47(1), Fla. Stat. (1947).

7. Ch. 74-106, § 1, Laws of Fla.

8. Ch. 75-220, § 63, Laws of Fla.

9. Ch. 79-343, § 6, Laws of Fla.

10. Mones v. Austin, 318 F.Supp. 653, 655 (S.D. Fla. 1970) (3 judge court). *Accord,* Finlayson v. Conner, 167 So.2d 569 (Fla. 1964).

11. *See, e.g.,* Railway Express Agency v. New York, 336 U.S. 106 (1949).

12. The case for co-personal representatives such as Pincus is even more compelling, as all the state's interests are fully protected by the co-representation of decedent's son.

Opinion of the Supreme Court of Florida

An Appeal from the Circuit Court in and for Broward Count, Leroy H. Moe, Judge — Case No. 78-4922

I. Meyer Pincus, in proper person, New York, New York
for Appellant

Gene Glasser of Abrams, Anton, Robbins, Resnick and Schneider, Holloywood, Florida,
for the Greenberg Estate, Appellee

Jim Smith, Attorney General, and Bruce Barkett and Thomas A. Beenck, Assistant Attorneys General, Tallahassee, Florida,
for Attorney General, Amicus Curiae

James G. Pressly, Jr. of Gunster, Yoakley, Criser and Stewart, Palm Beach, Florida,
for the Florida Bar, Real Property, Probate and Trust Law Section, Amicus Curiae

ORDER DENYING APPOINTMENT OF PERSONAL REPRESENTATIVE

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

Probate Division
No: 78-4922

In Re: Estate of LEO GREENBERG,

deceased

THIS CAUSE coming on to be considered on the Petition of I. Meyer Pincus to serve as Co-Personal Representative of the Estate of Leo Greenberg, deceased, and the Court having reviewed the Petition and taking into account that petitioner, I. Meyer Pincus is not a resident of the State of Florida nor related to the decedent as required by Florida Statutes §733.304, it is

ORDERED AND ADJUDGED that the undersigned judge concurs with the opinion and Order of the Hon. Leroy H. Moe dated December 4, 1978, and the Petition of I. Meyer Pincus to serve as Co-Personal Representative of the Estate of Leo Greenberg, deceased, is denied in accordance with Fla. Stat. §733.302 .

DONE AND ORDERED at Fort Lauderdale, Broward County, Florida, this 13th day of July, 1979.

s/ Paul M. Mark III
Circuit Judge

Order Denying Appointment of Personal Representative

Copy to:

Gene K. Glasser, Esq.,
Abrams, Anton, Robbins,
Resnick, Schneider & Mager, P.A.
2021 Tyler Street
Hollywood, Fla. 33022

ORDER DENYING APPOINTMENT OF PERSONAL REPRESENTATIVE

IN THE CIRCUIT COURT FOR BROWARD COUNTY, FLORIDA

PROBATE DIVISION

File Number 78-4922

Division Leroy H. Moe

IN RE: ESTATE OF LEO GREENBERG,

Deceased.

THIS CAUSE coming on the Petition of I. MEYER PINCUS to serve as Co-Personal Representative of the Estate of LEO GREENBERG, Deceased, and the Court having reviewed the Petition and taking into account that Petitioner, I. MEYER PINCUS is not a resident of the State of Florida nor related to the decedent as required by Florida Statute §733.304, it is,

ORDERED AND ADJUDGED that the Petition of I. MEYER PINCUS to serve as Co-Personal Representative of the Estate of LEO GREENBERG, Deceased, is denied in accordance with Florida Statute §733.302.

DONE AND ORDERED in Chambers, at Fort Lauderdale, Broward County, Florida, this 4 day of December, 1978.

LEROY H. MOE
CIRCUIT COURT JUDGE

ORDER EXTENDING TIME TO FILE BRIEF

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

CASE NO. 78-2759

IN RE: ESTATE OF LEO GREENBERG, Deceased.

November 21, 1979

BY ORDER OF THE COURT:

ORDERED that the September 5, 1979 Motion for Extension of Time to file appellant's brief is granted, and the time for the filing of appellant's brief is extended thirty (30) days.

I hereby certify the foregoing is a
true copy of the original court order.

s/ Clyde L. Heath
CLYDE L. HEATH
CLERK

cc: I. Meyer Pincus, Esq.
Reuben Schneider, Esq.
James G. Pressly, Jr., Esq.
Assistant Attorney General Thomas A. Beenck.

ORDER TO SHOW CAUSE

IN THE DISTRICT COURT OF APPEAL OF THE STATE
OF FLORIDA
FOURTH DISTRICT

IN RE: ESTATE OF LEO GREENBERG, Deceased.

CASE NO. 78-2759

February 1, 1980

BY ORDER OF THE COURT:

Appellant is ordered to show cause within twenty (20) days as to why this case should not be transferred to the Supreme Court of Florida as involving the constitutional validity of a Florida statute.

I hereby certify the foregoing is a
true copy of the original court order.

s/ Clyde L. Heath
CLYDE L. HEATH
CLERK

cc: I. Meyer Pincus, Esq.
Reuben Schneider, Esq.
James G. Pressly, Jr., Esq.
Assistant Attorney General Thomas A. Beenck.

ORDER OF TRANSFER

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

IN RE: ESTATE OF LEO GREENBERG, Deceased

CASE NO. 78-2759

February 28, 1980

BY ORDER OF THE COURT:

Pursuant to Fla.R.App.P. 9.030(a)(1)(A)(ii) and 9.040(b) this Appeal is hereby transferred to the Florida Supreme Court as presenting a substantial constitutional issue.

I hereby certify the foregoing is a
true copy of the original court order.

s/ Clyde L. Heath
CLYDE L. HEATH
CLERK

cc: I. Meyer Pincus, pro se
Reuben Schneider, Esq.
James G. Pressly, Jr., Esq.
Assistant Attorney General Thomas A. Beenck
Honorable Sid J. White, Clerk, Supreme Court of Florida
Honorable Robert E. Lockwood, Clerk of Circuit Court
(78-4922, Probate)

NOTICE OF APPEAL

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

IN RE: ESTATE OF LEO GREENBERG,
DECEASED,

I. MEYER PINCUS,

Petitioner-Appellant,

-against-

ESTATE OF LEO GREENBERG,

Appellee,

HON. PAUL M. MARKO, III,

Appellee,

HON. LEROY H. MOE,

Appellee.

Notice is hereby given that I. Meyer Pincus, petitioner-appellant, hereby appeals to the Supreme Court of the United States from the final order and judgment of the Supreme Court of Florida affirming an order of the Surrogate's Court, Seventeenth Judicial Circuit of Florida, Broward County, which denied appointment of petitioner as a co-personal representative of the Estate of Leo Greenberg, Deceased, entered on October 30, 1980. This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

Notice of Appeal

Dated: November 17, 1980

s/ Irving Bizar
Irving Bizar
Attorney for Petitioner-
Appellant
One Citicorp Center
153 East 53rd Street
New York, New York 10022
(212) 371-2400

TO:

REUBEN SCHNEIDER, ESQ.

Abrams, Anton, Robbins, Resnick & Schneider, P.A.
Attorneys for the Greenberg Estate
2021 Tyler Street
Hollywood, Florida 33020

HONORABLE PAUL M. MARKO, III
Circuit Judge
Seventeenth Judicial Circuit of Florida
Broward County Courthouse
Fort Lauderdale, Florida 33301

HONORABLE LEROY H. MOE
Circuit Judge
Seventeenth Judicial Circuit of Florida
Broward County Courthouse
Fort Lauderdale, Florida 33301

Notice of Appeal

ATTORNEY GENERAL, STATE OF FLORIDA
Department of Legal Affairs
Suite 1501 — The Capitol
Tallahassee, Florida 32301

GUNSTER, YOAKLEY, CRISER & STEWART, ESQS.
Attorneys for Amicus Curiae,
The Florida Bar, Real Property, Probate and Trust
Law Section
251 South County Road
Palm Beach, Florida 33480

CLERK OF THE SUPREME COURT OF THE STATE OF FLORIDA

Notice of Appeal

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

KALA KURZMAN, being duly sworn, deposes and says: deponent is not a party to this action, is over 18 years of age and resides at New York, New York.

On November 17, 1980 deponent served the within NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES upon

REUBEN SCHNEIDER, ESQ.
Abrams, Anton, Robbins, Resnick & Schneider, P.A.
Attorneys for the Greenberg Estate
2021 Tyler Street
Hollywood, Florida 33020

HONORABLE PAUL M. MARKO, III
Circuit Judge
Seventeenth Judicial Circuit of Florida
Broward County Courthouse
Fort Lauderdale, Florida 33301

HONORABLE LEROY H. MOE
Circuit Judge
Seventeenth Judicial Circuit of Florida
Broward County Courthouse
Fort Lauderdale, Florida 33301

ATTORNEY GENERAL, STATE OF FLORIDA
Department of Legal Affairs
Suite 1501 — The Capitol
Tallahassee, Florida 32301

Notice of Appeal

GUNSTER, YOAKLEY, CRISER & STEWART, ESQS.
Attorneys for Amicus Curiae,
The Florida Bar, Real Property, Probate and Trust Law Section
251 South County Road
Palm Beach, Florida 33480

These being all of the parties appearing in this proceeding and entitled to be served.

by depositing a true copy of same enclosed in a post-paid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

s/ Kala Kurzman
Kala Kurzman

s/ William M. Pollak
WILLIAM M. POLLAK
Notary Public, State of New York
No. 02 PO 4649704
Qualified in New York County
Commission Expires March 30, 1981

Sworn to before me this
17th day of November 1980

TEXT OF STATUTES INVOLVED

The Provisions of the United States Constitution Involved

United States Constitution, Art. IV §1:

> "Full Faith and Credit shall be given in each State to the public Acts, Records and judicial proceedings of every other State. And the Congress may by general Laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

United States Constitution, Art. IV §2:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

United States Constitution, Amend. XIV:

> "Section 1: All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Text of Statutes Involved

The Statutes Involved

Fla. Stat. §733.302 (1977):

"*Who may be appointed personal representative*

Subject to the limitations in this part, any person sui juris who is a citizen of the United States and a resident of Florida at the time of the death of the person whose estate he seeks to administer is qualified to act as a personal representative in Florida. A person who has been convicted of a felony or who, from sickness, intemperance, or want of understanding, is incompetent to discharge the duties of a personal representative is not qualified."

Fla. Stat. §733.304 (1977):

"Nonresidents

A person who is not domiciled in the state cannot qualify as personal representative unless the person is

(1) A legally adopted child or adoptive parent of the decedent.

(2) Related by lineal consanguinity to the decedent.

(3) A spouse or a brother, sister, uncle, aunt, nephew or niece of the decedent; or

(4) The spouse of a person otherwise qualified under this section."

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No. 80-1040

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

I. MEYER PINCUS, *Appellant,*

v.

ESTATE OF LEO GREENBERG, THE HONORABLE PAUL M. MARKO, III and THE HONORABLE LEROY H. MOE, *Appellees.*

On Appeal From The Supreme Court Of Florida

BRIEF FOR *AMICUS CURIAE* THE STATE OF FLORIDA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1040

I. MEYER PINCUS, *Appellant,*

v.

ESTATE OF LEO GREENBERG, THE HONORABLE PAUL M. MARKO, III and THE HONORABLE LEROY H. MOE, *Appellees.*

On Appeal From The Supreme Court Of Florida

BRIEF FOR *AMICUS CURIAE* THE STATE OF FLORIDA

INTEREST OF *AMICUS CURIAE*

The Attorney General of the State of Florida, pursuant to Rule 36.4, Rules of the Supreme Court of the United States, respectfully submits this brief on behalf of the State of Florida as *amicus curiae* urging that this appeal be dismissed on the grounds that it fails to present a substantial federal question or a justiciable case or controversy. Alternatively, the State of Florida submits that the judgment of the Supreme Court of Florida should be summarily affirmed.

The appellant seeks in this action to declare unconstitutional statutes of the State of Florida precluding a nonresident who is not a relative of the decedent from serving as personal representative of a Florida estate. However, because the appellant did not name as a party below the State or any other person interested in defending the statutes, the State has a vital interest in appearing as *amicus curiae* in support of its legislation.[1]

STATEMENT OF THE CASE

Leo Greenberg moved to Florida in 1972 and died a resident of that state in 1978.[2] His will designated the appellant, who drafted the will, as an alternate choice for co-personal representative. The appellant, I. Meyer Pincus, is a resident of New York who is not a relative of the decedent. He petitioned the Florida probate court for appointment as co-personal representative of the estate upon the withdrawal of an original nominee, but the petition was denied in accordance with Florida's statutory requirement that a personal representative be either a relative of the deceased or a Florida resident.

Mr. Pincus, while serving as an attorney for the estate, appealed the order denying his appointment,

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[1] The State of Florida wishes to preserve its right to intervene pursuant to Rule 28.4(c) if the judgment below is not summarily affirmed or the appeal dismissed.

[2] His estate consisted of Florida real estate, deposits in Florida banks, and intangible personal property, the situs of which is in Florida. *See Florida Steel Corporation* v. *Dickinson*, 328 So.2d 418 (Fla. 1976); *Beverly Beach Properties* v. *Nelson*, 68 So.2d 604 (Fla. 1953), *cert. denied*, 348 U.S. 816 (1954); *cf. Texas* v. *New Jersey*, 379 U.S. 674 (1965) (intangibles escheat to state of owner's domicile).

naming only the estate as an adverse party. The qualified personal representative of the estate and the primary beneficiaries consented to and supported the appellant's appointment as personal representative. Neither the appellee estate nor any other party has presented any arguments in opposition to the appellant's claims.

The Attorney General filed on behalf of the State of Florida a motion to intervene as a party at the appellate level, but was allowed to participate only as *amicus curiae*. The judges who denied the appellant's appointment were named as "parties" only upon filing of the Notice of Appeal to this Court.

In the probate court proceedings, Mr. Pincus asserted that the Florida statutes violated the privileges and immunities clause and the fourteenth amendment of the United States Constitution. During the appeal proceedings, the decision in *Fain* v. *Hall*, 463 F. Supp. 661 (M.D. Fla. 1979), was rendered, holding that due process requires that a nonresident nominee be afforded a hearing to demonstrate his ability to perform as personal representative. After that decision was rendered, appellant contended that the *Fain* decision worked an "estoppel by judgment" binding the Florida courts. The appellant did not assert in the state court proceedings that the Florida statutes violated the commerce clause or expressly claim that the probate court's denial of his appointment violated the full faith and credit clause. The Supreme Court of Florida rejected the appellant's constitutional claims and upheld the Florida statutes.

SUMMARY OF ARGUMENT

There is no case or controversy presented by the appeal because there is no adverse party to the suit.

Furthermore, the appeal presents no substantial federal question. The Constitution commits to the states the regulation of the administration of estates and the devolution of property within their jurisdictions. There is no federally protected fundamental right to appoint a personal representative, and, in the context of this case, there is no infringement of the fundamental rights to travel and to earn a livelihood. The statutory preclusion of unrelated nonresidents from serving in the important fiduciary capacity of personal representative is comparable to residency requirements for the practice of law and is rationally related to an important state goal, the effective and efficient administration of estates. Thus, the statutes do not deny any citizen equal protection, due process or the privileges and immunities of Florida residents. Appellant's commerce clause claim was not timely raised and is without merit. His full faith and credit claim was not expressly asserted below, is not a proper issue for appeal, and is without merit.

ARGUMENT

I. THE APPEAL PRESENTS NO JUSTICIABLE CASE OR CONTROVERSY.

There have never been any adverse proceedings between I. Meyer Pincus and the only nominal adverse party below, the Estate of Leo Greenberg, and the presence of an *amicus* is insufficient to create a justiciable controversy. *See Auto Workers* v. *Scofield*, 382 U.S. 205 (1965); *Western Union Telegraph Co.* v. *Foster*, 247 U.S. 105 (1917). Since the Court is being asked to render an advisory opinion on important state legislation in a case in which the record has not been fully developed through the presence of an adverse party undertaking to uphold the Florida statutes, it should

decline to hear this appeal. *See Sanks* v. *Georgia*, 401 U.S. 144 (1971); *United States* v. *Fruehauf*, 365 U.S. 146, 157 (1961); *see generally GTE Sylvania, Inc.* v. *Consumers Union*, 444 U.S. 818 (1980).

II. THE APPEAL PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

A. The Administration Of Estates Is Committed By The Constitution To The Several States.

The Constitution commits to the states the power to control and regulate the disposition of property within their jurisdictions and the administration of the estates of their citizens. *See Lalli* v. *Lalli*, 439 U.S. 259 (1978); *Labine* v. *Vincent*, 401 U.S. 532 (1971). Thus, supervision of testamentary dispositions is a legitimate and important state interest. Nothing in the Constitution forbids a state from limiting or even abolishing the power to make a testamentary bequest of property within its jurisdiction. *Irving Trust Co.* v. *Day*, 314 U.S. 556, 562 (1942).

Supervision of the administration of estates is a governmental function which, like the administration of justice, is entrusted to the courts. In both instances, the state has a significant and even compelling interest in ensuring that individuals acting in a representative capacity can fulfill their fiduciary obligations. A state's authority to regulate the practice of law is well recognized, *see, e.g., Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 792 (1975), and simple residency requirements for admission to state bars have been consistently found not to infringe any fundamental rights. *Leis* v. *Flynt*, 439 U.S. 438 (1979); *Norfolk and Western Railway Co.* v. *Beatty*, 423 U.S. 1009, *aff'g* 400 F. Supp. 234 (S.D. Ill.

1975); *Brown* v. *Supreme Court of Virginia*, 414 U.S. 1034, *aff'g* 359 F. Supp. 549 (E.D. Va. 1973). Appeals which present constitutional attacks on residency requirements for state bar admission are uniformly dismissed for failure to present a substantial federal question, *Martin* v. *Walton*, 368 U.S. 25 (1961); *Kovrak* v. *Ginsburg*, 358 U.S. 52 (1958), and this appeal should be treated in like fashion.

The state's interest in the appointment of a personal representative is in many respects even more compelling than the general regulation of the practice of law. The state's role in limiting the individuals who may serve as personal representatives is equivalent to that in appointing a qualified guardian to represent a minor or an incompetent, or in selecting a receiver in insolvency proceedings. In each case, the state must assure that the individual will protect the interests of one who is not present or able to guide the representative or the court or to personally evaluate the representative's performance. The discretion to make or approve the appointment of a personal representative has traditionally been delegated to the courts, and the states have legislatively restricted the class of persons from which the selection can be made to exclude those not best situated to serve.

By enacting the statutes in issue, the Florida legislature concluded that unrelated nonresidents are not in the best position to perform the duties of personal representatives. The administration of a decedent's estate is an intensely localized matter, requiring that the personal representative be well informed on local issues such as the scope of local property values, the identity of convenient and reputable appraisers, and local business practices. He must also be readily available to the court, beneficiaries and creditors in order to answer

questions and take all necessary and timely actions.[3] Because this regulation of the process contributes to the effective, efficient and expeditious administration of the estate, it is, at a minimum, substantially related to this legitimate and compelling state goal.

B. No Fundamental Rights Are Infringed By The Florida Statutes.

(1) There is no fundamental right to appoint a personal representative.

This Court has steadfastly resisted efforts to expand fundamental rights and has confined that concept to

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[3] The availability of the personal representative, defined more broadly than mere amenability to service of process, is important to the effective administration of estates. Under Florida's statutory scheme, the personal representative must take possession of the estate assets, *Fla. Stat.* §733.607 (1978), must perform, compromise or refuse performance of the decedent's contracts, *id.* §733.612(2), and must secure appraisals of assets. *Id.* §733.605. In the area of creditors' claims, the representative has an obligation to creditors and beneficiaries, *id.* §733.612(20) and (24), and must evaluate claims against the estate and, to preserve decedent's rights, object to them within four months of the first publication of notice of administration and, where necessary, sue to recover assets. He must consult with beneficiaries on a continuing basis regarding their needs and the timing, nature and tax aspects of distributions. He must file tax returns and reports and inventories required by the local probate court. *Id.* §733.604(1). The statutes empower the personal representative, without a court order, to continue any unincorporated business of the decedent for a period, *id.* §733.612(22), and to sell the decedent's property under a testamentary power to do so. *Id.* §733.613. The Florida courts must supervise these actions, and the Florida legislature can, on the basis of practical experience, resonably conclude that administration by Florida residents should be more effective since residents are more likely than nonresidents to be responsive to the Florida judiciary.

those rights which are explicitly or implicitly guaranteed by our federal Constitution. Thus, such important interests as education and housing are not deemed to be fundamental rights. *See, e.g., San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973) (education); *Lindsey* v. *Normet*, 405 U.S. 56 (1972) (housing). The Constitution does not expressly provide a right to appoint a personal representative to oversee one's testamentary disposition, and the constitutional language cannot be construed to imply such a fundamental right. There is not even a fundamental right to make a testamentary disposition of one's property or to receive a testamentary devise. These are statutory privileges created by the states pursuant to the power constitutionally reserved to them. Consequently, there can be no fundamental right to appoint a personal representative to oversee that testamentary disposition and the administration of one's estate.[4]

The appointment of a personal representative cannot be equated with the intimate family decisions regarding procreation, divorce and marriage addressed respectively by this Court in *Roe* v. *Wade*, 410 U.S. 113 (1973), *Boddie* v. *Connecticut*, 401 U.S. 371 (1971), and *Loving* v. *Virginia*, 388 U.S. 1 (1967). The Constitution does not create a broad category of fundamental rights under the banner of "family decisions." Decisions regarding procreation, divorce or marriage have been deemed by the Court to be fundamental only because they are encompassed by the constitutional right of privacy. The right of privacy cannot logically be expanded to include the choice of a personal representative.

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[4] This Court has recognized that there is no right of federal origin allowing one to choose an attorney who does not meet state residency qualifications. *E.g., Leis* v. *Flynt*, 439 U.S. 438 (1979).

The selection of a family doctor or lawyer is a more vital family decision than the selection of a personal representative. Yet it is well settled that even these decisions do not involve fundamental rights, *Leis* v. *Flynt,* 439 U.S. at 443, *Brown* v. *Supreme Court of Virginia,* 359 F. Supp. at 559 and 562 n.15, and cannot be given that status simply because they may be remotely related to some constitutionally protected right. *Cf. San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1 (1973). As stated in *Norfolk and Western Railway Co.* v. *Beatty*, 400 F. Supp. 234, 237 (S.D. Ill.), *aff'd*, 423 U.S. 1009 (1975), "No constitutional basis is found to grant a civil litigant, patient or other client the right to compel the admission of a nonresident to the practice of law, medicine, or other profession within a state." Likewise, there can be no constitutional basis for a right to appoint a personal representative simply because that action may affect family members.

Even if there were some fundamental right to appoint a personal representative, it would be the testator's right. A denial of any such right of the testator could result in injury only to the protected interests of the estate or its beneficiaries, who are not appellants in this suit. Mr. Pincus personally has suffered no such injury, and therefore has no standing to assert infringement of any right of the decedent. *See Flast* v. *Cohen,* 392 U.S. 83, 98-101 (1968); *Baker* v. *Carr,* 369 U.S. 186, 204 (1962).

(2) The right to travel is not unconstitutionally restricted by the Florida statutes.

Although the right to travel throughout the states is a fundamental right protected by the Constitution, state

statutes are subject to strict scrutiny only if they somehow penalize the exercise of that right. *See Memorial Hospital* v. *Maricopa County,* 415 U.S. 250, 256-57 (1974); *Shapiro* v. *Thompson,* 394 U.S. 618, 631 (1969). Mr. Pincus complains that Leo Greenberg's right to travel was unconstitutionally penalized because his chosen personal representative was no longer qualified to serve when Mr. Greenberg moved to Florida. However, the right to travel requires only that a person who moves from one state to another be given benefits *equal* to those enjoyed by residents of the state to which he travels, not superior rights that he enjoyed in the state from which he came. *Califano* v. *Torres,* 435 U.S. 1 (1978). All citizens of Florida are prohibited by the Florida statutes from having unrelated nonresidents serve as personal representatives. Thus, the statutes may make Florida a less attractive destination to the testator, but they do not unconstitutionally restrict his fundamental right to travel. This Court has consistently recognized that simple residency requirements do not unconstitutionally impact on the right to travel. *McCarthy* v. *Philadelphia Civil Service Commission,* 424 U.S. 645 (1976); *Maricopa County,* 415 U.S. at 255; *accord, Brown* v. *Supreme Court of Virginia,* 359 F. Supp. at 561.

In any event, the appellant has no standing to assert an unconstitutional restriction of the testator's right to travel. An infringement of that right would not result in any direct injury to any constitutionally protected interest of the appellant.

(3) The appellant's fundamental right to pursue a livelihood is not infringed by the Florida statutes.

Appellant's fundamental right to pursue a livelihood gives him no more constitutional right to serve as a personal representative in Florida than he has to practice law in Florida. Residency requirements for bar admission do not violate a nonresident's fundamental right to earn a livelihood. *See Leis* v. *Flynt,* 439 U.S. 438 (1979); *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773, 792 (1975); *In re Griffiths,* 413 U.S. 717, 722-23 (1973); *Brown* v. *Supreme Court of Virginia,* 359 F. Supp. 549 (E.D. Va. 1973). A residency requirement for personal representatives likewise cannot violate that right.

C. Since No Fundamental Right Is Infringed, The Florida Statutes Need Only Reasonably Serve An Important State Interest.

(1) The Florida statutes do not deny the decedent or the appellant equal protection.

Regardless of the level of scrutiny applied, the Florida statutes do not violate the equal protection clause because the residency requirement is substantially related to the State's compelling and important interest in the efficient and effective administration of estates. *See Lalli* v. *Lalli,* 439 U.S. 259 (1978) (equal protection allows state to restrict illegitimate's right of inheritance); *In re Emery,* 59 Ohio App.2d 7, 391 N.E.2d 746 (1978) (statutory preclusion of nonresident executors held not to deny equal protection). *Cf. Brown* v. *Supreme Court*

of Virginia, 414 U.S. 1034, *aff'g* 359 F. Supp. 549 (E.D. Va. 1973) (residency requirement for bar admission held not a denial of equal protection); *accord, Wilson* v. *Wilson,* 416 F. Supp. 984 (D. Ore. 1976), *aff'd,* 430 U.S. 925 (1977).

The Florida legislature could rationally decide that requiring a personal representative to be a Florida resident or a relative of the decedent would better ensure that creditors, beneficiaries and assets will be protected and that the estate will be administered without needless delays or costs.[5] The exception for nonresident relatives does not indicate, as appellant contends, that the residency requirement is illogical. A relative named by a testator is in most circumstances a trusted family member who is also a primary beneficiary of the estate or has a personal interest in the welfare of other beneficiaries. He is more likely to be in close contact with beneficiaries and creditors and to make himself available in the state of the decedent's residence to protect his personal interest in the administration of the estate. Therefore, his interest in the expeditious, efficient and effective administration of the estate counterbalances any disadvantage of having a nonresident personal representative.

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[5] Contrary to the appellant's assertions, a bonding requirement inadequately protects the estate from potential loss. Florida law specifically provides for waiver of the posting of bond by a personal representative. *See Fla. Stat.* §733.402 (1978). Such a waiver is frequently inserted in wills, and was indeed inserted in the Greenberg will. In addition, the fact that a nonresident personal representative is amenable to service of process in Florida courts in some instances affords inadequate protection. No provision of the Florida statutes establishes service in an action for mismanagement of the estate by a nonresident personal representative. His failure to perform his duties properly could, therefore, result in detriment to the estate and loss to the beneficiaries and creditors.

The fact that a particular unrelated nonresident may be able to perform as well as a nonresident relative does not make the statutory classification illogical. As the Court stated in *Lindsley* v. *National Carbonic Gas Co.*, 220 U.S. 61, 78 (1911), "A classification having some reasonable basis does not offend against [the equal protection] clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality." *See Parham* v. *Hughes*, 441 U.S. 347, 357-58 (1979).

(2) The Florida statutes do not deny the decedent or the appellant due process of law.

The Florida statutes do not establish an irrebuttable presumption that nonresidents are not competent to serve as personal representatives, but merely reflect a legislative determination of the most effective method for the administration of estates. Under the Florida statutes, the competence of the appellant is irrelevant. Even if the statutes are analyzed as containing a presumption, however, due process does not require that the appellant be given a hearing to demonstrate his qualifications because the Florida statutes do not impinge upon fundamental rights or involve a suspect classification. It is only essential that there be some rational connection between the fact of nonresidency and the presumption that estates are better administered by residents or family members, and that this connection not be so unreasonable as to be arbitrary. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976); *Weinberger* v. *Salfi*, 422 U.S. 749 (1975); *McDonald* v. *Board of Election*, 394 U.S. 802 (1969). As already noted, the Florida legislature can rationally conclude that unrelated nonresidents are not best suited to serve

as personal representatives. Thus, the statutes are neither arbitrary nor unreasonable. *See Leis* v. *Flynt,* 439 U.S. at 443-45; *Sosna* v. *Iowa,* 419 U.S. 393, 409-10 (1975); *Moore* v. *Supreme Court of South Carolina,* 447 F. Supp. 527 (D.S.C. 1977), *aff'd,* 577 F.2d 735 (4th Cir.), *cert. denied,* 439 U.S. 984 (1978).

D. The Florida Statutes Do Not Deny The Appellant The Privileges And Immunities Of The Citizens Of Florida.

Mr. Pincus apparently claims that he was denied the privilege of serving as a personal representative in Florida, and that reservation of that activity for residents or relatives of decedents violates the privileges and immunities clause. Yet the privileges and immunities clause protects against only those distinctions between residents and nonresidents which hinder the formation, purpose or development of a single union of states and requires that nonresidents be treated equally with residents only where the nonresident is seeking to "engage in an essential activity or exercise a basic right." *Baldwin* v. *Montana Fish and Game Commission,* 436 U.S. 371, 387 (1978); *see Hicklin* v. *Orbeck,* 437 U.S. 518 (1978).

Serving as a personal representative does not rise to the level of an essential activity or basic right, nor can it be said to be a privilege or immunity bearing upon the vitality of this nation as a single entity. Accordingly, appellant's appointment is not protected by the privileges and immunities clause of the Constitution. *See In re Mulford,* 217 Ill. 242, 75 N.E. 345 (1905) (statutory preclusion of nonresident executors held not to violate the privileges and immunities clause).

E. The Appellant's Claim Under The Commerce Clause Is Not Properly Before This Court And Is Wholly Without Merit.

The appellant did not raise his commerce clause claim in the Florida courts and has therefore failed to preserve this issue for review by this Court. *See Cardinale* v. *Louisiana,* 394 U.S. 437 (1969).

Even if the commerce clause claim were properly raised below, it has no merit. Denying the appellant the right to serve as the personal representative of an estate does not "materially restrict the free flow of commerce" and has at most only a de minimus and incidental effect upon interstate commerce. *See Goldfarb* v. *Virginia State Bar,* 421 U.S. at 792; *Head* v. *New Mexico Board of Examiners,* 374 U.S. 424 (1963); *Huron Portland Cement Co.* v. *City of Detroit,* 362 U.S. 440 (1960).

F. The Appellant's Claim Under The Full Faith And Credit Clause Is Not Properly Before This Court And Is Wholly Without Merit.

The appellant did not expressly assert a full faith and credit claim in the Florida courts and has therefore also failed to preserve this issue for review.

Moreover, the appellant's full faith and credit claim does not address the constitutional validity of the Florida statutes but is an attack upon the action of the Supreme Court of Florida in not following the *Fain* decision. This issue is not a proper subject for appeal, and should be disregarded in determining the propriety of reviewing this case. *See DeBacker* v. *Brainard,* 396 U.S. 28 (1969); *Mishkin* v. *New York,* 383 U.S. 502, 512 (1966); *Union National Bank* v. *Lamb,* 337 U.S. 38 (1949).

Furthermore, the judgment in *Fain* does not bind the appellee estate, which was neither a party nor in privity with parties to that suit.[6] Appellant's contention, which is in effect an assertion that the judgment of the first court to decide an issue of law may be used by a stranger to the first action to estop a defendent also a stranger to the first action, is patently erroneous. A federal district court's declaratory judgment on unmixed questions of law regarding the constitutionality of a state statute of public importance does not estop that state's highest court from reaching an independent decision. *See United States* v. *Moser,* 266 U.S. 236, 242 (1924); *Restatement (Second) of Judgments* §88.7 (Tentative Draft No. 3, 1976).

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[6] The State of Florida, as an *amicus* in this case, is not a party for purposes of res judicata or collateral estoppel. *See Auto Workers* v. *Scofield,* 382 U.S. 205 (1965); *Western Union Telegraph Co.* v. *Foster,* 247 U.S. 105 (1917). The appellant was not a party to the *Fain* case. The appellees Paul M. Marko, III and Leroy H. Moe were not named as parties in the state court proceedings in this case.

CONCLUSION

For the reasons stated herein, either this appeal should be dismissed or the judgment of the Supreme Court of Florida should be affirmed.

Respectfully submitted,

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No. 80-1040

In The

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October Term, 1980

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Appellant,

vs.

ESTATE OF LEO GREENBERG, HON. PAUL M. MARKO, III and HON. LEROY H. MOE,

Appellees.

On Appeal from the Supreme Court of Florida

REPLY BRIEF FOR APPELLANT

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Appellees.

On Appeal from the Supreme Court of Florida

REPLY BRIEF FOR APPELLANT

Appellant submits this short reply to the brief of Amicus Curiae, the State of Florida ("Amicus").

1. The contention of Amicus that there is no "case or controversy" flies in the face of the undisputed facts below. Appellant applied for appointment as a co-personal representative of decedent's estate pursuant to decedent's wishes expressed in his Will. While the estate did not oppose the appointment, the courts below denied the application. Appellant

appealed the denial of his appointment, and the appeal was heard by the Supreme Court of Florida. While the estate did not oppose the appeal, Amicus appeared on the appeal in opposition to appellant. Although it claimed to be *amicus curiae* in that court, it took an adversarial position in arguing that the denial of the appointment should be affirmed. Amicus still takes an adversary position in this Court, although it disguises its position by claiming that it appears as *amicus curiae.*

Thus, there is truly a "case or controversy" in that appellant has standing by virtue of the denial of his rights, and his adversary is the State of Florida which persists in the denial of those rights. Furthermore, the estate is also a party in this proceeding. It was a party in the lower courts and in the Florida Supreme Court and is a party to this appeal. Surely appellant cannot lose his right to appeal from the direct injury to him simply because the estate does not oppose his appointment.

Finally, it should be noted that the Florida Supreme Court affirmed the denial of appellant's appointment solely on federal grounds. Thus, the case is properly before this Court. 28 U.S.C. §1257; *Indiana ex rel. Anderson v. Brand,* 303 U.S. 95 (1938), *reh. denied,* 303 U.S. 667.

2. Amicus claims that there is no substantial federal question. Four judges have disagreed, *i.e.,* three dissenting judges of the Supreme Court of Florida and the judge of the federal district court who decided *Fain v. Hall,* 463 F. Supp. 661 (M.D. Fla. 1979). In this connection, the New York Surrogate's Court has also recently opined that these same Florida statutes are unconstitutional, *see In re Katherine Brown,* N.Y.L.J. 16 (Jan. 16, 1981), which demonstrates the spreading judicial interest in this important issue.

Contrary to the assertion of Amicus, this Court has never passed upon the question being presented on this appeal. To assert that the State has the right to prevent a decedent from determining how his estate is to be administered is a question which deserves this Court's attention, especially where the State makes distinctions based upon residency. We submit that the right to name an administrator of one's own choice is constitutionally protected for the reasons set forth in our main jurisdictional statement. It is not a question which involves determinations as to who can share in one's estate in the absence of a Will.

Moreover, the question at bar is not limited solely to lawyers or other professionals in whom a State would have some interest in regulating. The Florida prohibition applies to every non-resident, even if the non-resident is the decedent's close friend of 50 years standing. There can be no legitimate reason for excluding non-residents. The probate courts supervise the administration of estates, and nothing can happen to an estate without full accountability to the court.

Amicus suggests that Florida has greater interests in the estate administration than did the decedent. But Amicus distorts the facts herein to justify that interest. While decedent did die possessed of Florida real estate and a Florida bank account, the real estate was the apartment in which he resided and the bank account was a small one from which he paid his living expenses. The vast bulk of the estate — well over $1,000,000 — was and is situated outside of Florida. Amicus would nevertheless require Florida to assert jurisdiction over the non-Florida assets.

Finally, it is a mockery to believe that Florida would somehow achieve a better administration of the estate by appointing a total stranger than it would from appellant, who was decedent's close personal friend and advisor for many years.

3. Contrary to the assertion of Amicus, appellant raised every constitutional question below except the application of the Commerce Clause. He did not raise the Commerce Clause question until the appeal in this Court, and this was due to the fact that the decision by the Florida Supreme Court was decided before *Lewis v. B.T. Investment Manager, Inc.*, ____ U.S. ____, 100 Sup. Ct. 2009 (1980). With the decision in *Lewis,* the Commerce Clause issue became ripe for consideration in this case and we assert that question now. This Court can consider additional constitutional questions raised here though not raised below. *Banco National de Cuba v. Sabbaturo,* 376 U.S. 398 (1964); *Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967).

It is respectfully submitted that the appeal herein warrants plenary consideration.

Respectfully submitted,

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